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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

FREEMAN H. RINGER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Although petitioner's statement that this case concerns the jurisdiction of a federal district court is technically correct, that assertion—like most of the argument in support of the Petition for a Writ of Certiorari—is deceptively sterile. Notwithstanding petitioner's effort to downplay the factual background of respondents' complaint, this case involves an unusual instance of an administrative agency at war with itself. Indeed, respondents are aware of only two reported cases in which plaintiffs have alleged factually similar substantive claims. In both cases—only one of which arose under the Social Security Act—the Courts of Appeals agreed with the Ninth Circuit's ruling here and found jurisdiction to review claims that federal administrative agencies illegally were requiring private parties to relitigate repeatedly issues which the agencies consistently lost before their own administrative law judges.

Respondents' principal complaint is that petitioner, the Secretary of Health and Human Services (the "Secretary"), requires persons seeking medicare reimbursement for a surgical procedure known as bilateral carotid body resection ("BCBR") to relitigate repeatedly the safety and efficacy of the procedure. The Secretary insists on duplicative and costly relitigation despite the fact that at least ten different administrative law judges ("ALJs"), sitting in some twenty-five consolidated cases, and the Appeals Council, the highest quasi-adjudicative body within the Department of Health and Human Services, have ruled in 170 individual appeals that BCBR is safe and effective, that the procedure is reasonable and necessary treatment for chronic obstructive pulmonary disease ("COPD") and, accordingly, that the medicare program must pay the costs of BCBR. The Secretary demands further administrative litigation despite her insistence that publication of "a formal administrative ruling, binding upon ALJs and the Appeals Council," absolutely prohibits medicare payment for BCBR performed to relieve symptoms of pulmonary distress. Petition for a Writ of Certiorari ("Petition") at 6. Thus, the Secretary requires the elderly and disabled beneficiaries of the medicare program to relitigate in hearings, which she admits they can no longer win, issues which she has lost repeatedly.

In a similar case where the Secretary reaffirmed a disputed policy rejected only four times by the ALJs and the Appeals Council, the Second Circuit aptly stated the jurisdictional question here:

> We thus face the rather novel question of whether judicial relief is available where all eligible . . . claimants . . . are required to exhaust their administrative remedies on an individual basis in order to receive benefits which the SSA's own Appeals Council has consistently ruled must be given them. The issue is whether a federal court is powerless to prevent the Secretary from insisting upon the sterile gesture of individual exhaustion when the result appears to be a foregone conclusion.

Jones v. Califano, 576 F.2d 12, 17 (2nd Cir. 1978). Although the petitioner chooses to ignore the unusual factual setting of this case, the jurisdictional issues cannot be addressed without an accurate and complete understanding of the circumstances in which this case arose.[1]

Bilateral carotid body resection is a surgical procedure developed in the early 1960's for relief of the symptoms of severe chronic obstructive pulmonary disease (*e.g.,* chronic bronchitis, emphysema, asthma).[2] From the mid 1970's to the present the Secretary has taken the position that BCBR is never "reasonable and necessary" treatment and has refused to pay medicare benefits for BCBR unless ordered to do so by an ALJ. The Secretary contends that BCBR has not been proven "safe

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[1] Petitioner's description of the medicare program is adequate and will not be repeated.

[2] The carotid bodies are structures the size of a rice grain located on each side of the neck which are involved in a reflex system which controls the diameter of the bronchical tubes. Under normal conditions, when the carotid body senses a significantly reduced blood oxygen level, nerve impulses are generated, triggering a reflex system which rapidly increases ventilation, reducing the level of carbon dioxide in the blood. Thereafter, ventilation is reduced and the respiratory system is returned to a normal, steady rate. In people who have COPD, the reflex system is hyperreactive and triggers at a much lower threshold than it does in normal individuals, producing a severe bronchospasm, sometimes evident clinically as an asthmatic attack, chronic bronchitis (coughing), or emphysema (*i.e.,* shortness of breath). Considerable evidence developed through use of the Winter technique of BCBR seems to indicate that removal of the carotid bodies immediately changes (*i.e.,* elevates) the threshold at which the reflex system triggers, relieving the bronchospasm of COPD patients and opening the bronchial passages. After BCBR, the patient will experience fewer or no reflex responses unless there is an overwhelming stimulus. BCBR surgery does not cure COPD. However, the change effected by BCBR may be sufficient to preclude further symptoms for the remainder of the patient's life, thereby allowing the patient to lead a more independent and normal life. Further, because the debilitating symptoms of COPD largely are eliminated by BCBR, patients require fewer doctor visits and the need for repeated hospitalization—all reimbursed by medicare—is likewise often eliminated. *See generally In re Ferguson,* No. 126-12-3830 (HHS Appeals Council, October 18, 1979).

and efficacious" and that the treatment is not accepted generally by the medical community. Significantly, the Secretary's position is based upon an alleged lack of data and *not* upon data or proof that BCBR is unsafe or ineffective.

Despite the Secretary's prohibition on payment for BCBR, many patients have undergone the surgery. The Secretary uniformly denies reimbursement, and medicare beneficiaries regularly challenge the denial in administrative hearings. In *every one* of the 170 claims decided prior to the filing of this lawsuit, BCBR was found to be reasonable and necessary and the medicare program was ordered to pay the cost of the surgery. The 170 claims were decided in approximately twenty-five separate cases by at least ten different ALJs.

Following rejection of the "no payment" policy in the first 70 appeals, the Secretary appealed the decisions as a group to the HHS Appeals Council, a panel of administrative law judges and the highest administrative hearing body with jurisdiction to review the cases.[3] After three days devoted almost exclusively to expert medical testimony, the Appeals Council ruled that the cost of BCBR must be paid by the medicare program. *In re Ferguson,* No. 126-12-3830 (HHS Appeals Council, October 18, 1979). A parade of witnesses testified before the Appeals Council that BCBR was effective in relieving the symptoms of COPD. After comparing mortality figures for BCBR patients against similar figures for patients treated conventionally (usually medicinally), the Appeals Council held that BCBR posed "no unacceptable risk," ruled that BCBR was reasonable and

[3] Technically, only one case was before the Appeals Council, but the decision governs all 70 cases decided by ALJs to that point. Similar procedures were followed by ALJs. Thus, while there are no regulations specifically providing for class actions before ALJs, individual claims were typically consolidated for hearing and decision. Consolidation was possible because the single issue in each hearing was the validity of the Secretary's policy forbidding payment. The Appeals Council, for example, refused to hear testimony from individual patients because, based on the records below, it assumed that all claimants would testify favorably. *In re Ferguson,* No. 126-12-3830 at 3 (HHS Appeals Council, October 18, 1979). Instead, the Appeals Council limited review to the questions posed by the Secretary regarding the validity of the medical evidence supporting the Secretary's policy.

necessary treatment and ordered that medicare reimburse the costs of the treatment. *See In re Ferguson,* No. 126-12-3830 at 22 (HHS Appeals Council, October 18, 1979).

Respondents' initial complaint, which was filed in September, 1980, alleged several related bases for relief. Respondents' principal claim, as the Court of Appeals recognized, was that the Secretary's claims review procedures were unconstitutional and illegal insofar as claimants were required to relitigate repeatedly issues which the Secretary has lost time after time. Respondents' claims in the latter regard were based chiefly upon the due process clause of the United States Constitution and upon 42 U.S.C. § 405(h). In addition, respondents claimed that adherence to procedures requiring claimants to relitigate repeatedly a single issue which, prior to filing of this action, always was resolved adversely to the Secretary was arbitrary and capricious action in violation of the Administrative Procedure Act ("APA") and the Social Security Act. Finally, respondents claimed that the Secretary's payment prohibition was void because it had not been promulgated in accordance with the rulemaking requirements of the APA or the Social Security Act.

Respondents sought declaratory and injunctive relief precluding the Secretary from continuing to adhere to illegal claims review procedures, particularly insofar as such procedures required claimants to undergo essentially duplicative and meaningless hearings. Respondents did not seek a determination of eligibility for medicare benefits and did not request that the Court order payment of benefits.[4] In fact, respondents recognized that the District Court would not award benefits and continued to pursue their benefit claims through the, albeit illegal, administrative procedures established by the Secretary.

In October, 1980, one month after suit was filed in this case, petitioner published a formal Health Care Financing Administration ("HCFA") Ruling prohibiting Medicare payment for BCBR in any circumstances. 45 *Fed. Reg.* 71426

[4] The Court of Appeals nonetheless held that respondents' secondary claims were claims for benefits under the Medicare Act. *Ringer v. Schweiker,* 697 F.2d 1291, 1294 (9th Cir. 1982).

(October 28, 1980). The Ruling was predicated on "a lack of clinical data, *i.e.*, controlled studies to find that the procedure is safe and effective," precisely the issue resolved adversely to the Secretary by the ALJs and by the Appeals Council. *Id.* Since the promulgation of the BCBR Ruling, one ALJ has refused to order payment for BCBR.[5]

The Secretary has stated over and over again that "[b]y reason of the Secretary's ruling published in the *Federal Register,* the administrative law judges and the appeals council are required to follow the Secretary's ruling precluding coverage for BCBR" (D. Brief at 28 n.11), and that, due to the Ruling, "no beneficiaries will be reimbursed for BCBR." *Id.* at 20. In addition, in the District Court the Secretary stipulated that:

> The Department of Health and Human Services has ruled that "Bilateral carotid body resection performed to relieve and treat pulmonary symptoms and diseases is not established as safe and effective and, therefore, is excluded from Medicare coverage under the authority of Section 1862(a)(1) of the Act."

In this Court, petitioner again asserts that the Ruling binds both the ALJs and the Appeals Council to deny all claims for BCBR:

> [I]n October, 1980, HCFA issued a formal administrative ruling, binding upon ALJs and the Appeals

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[5] Respondents submitted a copy of the decision in this case to the Ninth Circuit Court of Appeals. The decision involved surgeries performed both before and after the BCBR Ruling. Reimbursement was denied in all cases, but reimbursement was denied for treatment performed after publication of the Ruling solely on the basis of the Ruling. Petition at 20 n.15.

This single adverse decision illustrates one of the practical inequities of the Secretary's position. For example, where, as here, the Agency loses all but a single case before the ALJs, and judicial review of the single adverse decision is sought, the Secretary likely will be afforded the substantial advantage of arguing on appeal that the single decision favorable to the Agency must be accorded deference and affirmed under the substantial evidence test despite the fact that the ALJs, on full consideration of the merits, regularly reject the Agency's position.

> Council, that prohibits payments under Medicare for BCBR performed to relieve symptoms of pulmonary distress.

Petition at 6. All claims presented to an ALJ for BCBR performed after October 1, 1980, have been denied based solely upon the Ruling.

Finally, the human significance of the Secretary's demand for further administrative litigation should not be lost in the technical legal arguments. Since this action was filed two of the original named plaintiffs have died. One of the plaintiffs, Ernie M. Haley, died while awaiting BCBR. In addition, contrary to the Secretary's assertion, Petition at 20, respondent Jean Vescio had not had BCBR at the time the case was filed. However, after filing of the original complaint, Ms. Vescio's physical condition deteriorated to the point that BCBR could not be delayed irrespective of the Secretary's payment prohibition. Hospital and surgical services were arranged for Ms. Vescio on an emergency basis without any assurance of payment, and on October 11, 1980, Ms. Vescio underwent BCBR and thereafter filed a claim for payment. The Secretary does not even mention the impact of the policy on those beneficiaries, who unlike Ms. Vescio, are unable to obtain emergency care without charge and are therefore left to suffer or, perhaps, to die. Similarly, the Secretary cavalierly dismisses in a footnote the question of how claimants, such as respondent Ringer, who are unable to pay for the surgery themselves, file a claim for reimbursement and then litigate the claim administratively, ever could challenge the Secretary's policy.[6]

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[6] While Mr. Ringer did not file a formal claim for payment of Medicare benefits, he did informally request that reimbursement be made available for his surgery. Mr. Ringer was advised that no information could be provided unless he underwent treatment and filed a claim for reimbursement. Ms. Vescio also sought to determine coverage prior to obtaining BCBR. Ms. Vescio was advised that BCBR was excluded from coverage and would not be covered. Under *Mathews v. Eldridge*, 424 U.S. 319 (1976) the filing of such a request constitutes the filing of a claim under 42 U.S.C. § 405. *See* 424 U.S. at 329.

REASONS WHY THE WRIT SHOULD BE DENIED.

I. Summary of Argument.

Even if one accepts petitioner's erroneous assumption that this case is an action to recover medicare benefits subject to the jurisdictional bar of 42 U.S.C. § 405(h), petitioner's claim that the Court of Appeals ruling cannot be reconciled with *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) is plainly and demonstrably wrong. Not only is this case consistent with the holdings in *Salfi* and *Eldridge*, but petitioner's admission that the BCBR Ruling absolutely prohibits the ALJs and the Appeals Council from awarding reimbursement for BCBR places this case within the rule of *Mathews v. Diaz*, 426 U.S. 67 (1976). As in *Diaz*, petitioner's repeated acknowledgment that no BCBR claims can be allowed under the Ruling is "tantamount to a decision denying the application and . . . a waiver of the exhaustion requirements." 426 U.S. at 73, 77. Further, the ruling of the Court of Appeals is consistent with decisions of this Court and other courts recognizing that a challenge to the legality of an administrative review process is distinct from a challenge to the merits of an agency decision and therefore is exempt from any otherwise applicable exhaustion requirements.

Second, because jurisdiction is available under 42 U.S.C. § 405(g) there is no need to determine whether jurisdiction is also available under the mandamus statute, 28 U.S.C. § 1361. Nonetheless, the Court of Appeals ruling that mandamus jurisdiction is available for respondents' procedural claims is both correct and consistent with numerous other cases addressing the question. Moreover, there is no question that this case is appropriate for the exercise of mandamus jurisdiction. Respondents have alleged that the Secretary subjects claimants to unlawful administrative review processes in violation of specific obligations imposed by 42 U.S.C. § 405(h) and by the due process clause of the United States Constitution. The decisions of this Court and of the Courts of Appeals in related contexts have held that the federal courts have mandamus jurisdiction under 28 U.S.C. § 1361 to order the Secretary to conform to the requirements imposed by law.

Similarly, because there is jurisdiction under 42 U.S.C. § 405(g) to hear this case whether respondents' claims are characterized as "procedural" or as claims for benefits, it is unnecessary to consider other potential bases for jurisdiction. However, it is also apparent that, as the Court of Appeals held, respondents' principal claims are in fact purely procedural and this is not an action "to recover on any claim" arising under the Medicare Act. 42 U.S.C. § 405(h). Consequently, federal question jurisdiction over respondents' complaint is not intercepted by 42 U.S.C. § 405 as interpreted and applied in *Salfi* and *Eldridge*.

Finally, issuance of a writ of certiorari is particularly inappropriate due to the virtually unique factual circumstances of this case. Indeed, this case arose solely because the Department of Health and Human Services persists in adhering to schizophrenic benefit review procedures in which all BCBR claims are denied initially notwithstanding regular rulings by the Department's own ALJs that BCBR is reasonable and necessary treatment and, therefore, reimbursable under the medicare program. Petitioner's timeworn argument that the Court of Appeals decision will open the floodgates to premature litigation is wrong. In more than forty years since passage of the Social Security Act there has been only one other reported decision in which a court has asserted jurisdiction due to the Secretary's failure to conform to the rulings of the ALJs and the Appeals Council.

II. The Decision Of The Court Of Appeals Finding Jurisdiction Under 42 U.S.C. § 405(g) Is Consistent With *Weinberger v. Salfi* And Its Progeny.

Petitioner's principal argument for review is that the Court of Appeals misread the jurisdictional limitations imposed by 42 U.S.C. §§ 405(g) and (h) and ruled inconsistently with the decisions of this Court in *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). Petitioner claims that the Court of Appeals decision circumvents the jurisdictional limitations of 42 U.S.C. § 405(h) by authorizing judicial review before respondents have exhausted their administrative remedies. Petition at 16-24.

Petitioner has misread both *Salfi* and *Eldridge*. Further, petitioner completely ignores the factual background of the present case and the controlling impact of this Court's decision in *Mathews v. Diaz*, 426 U.S. 67 (1976).

In *Mathews v. Eldridge*, 424 U.S. 319 (1976) this Court explained that *Salfi* interpreted Section 405(g) to establish two prerequisites—one waivable, one nonwaivable—to the exercise of jurisdiction over a claim for medicare benefits. 424 U.S. at 328. The nonwaivable component of Section 405(g) jurisdiction is the requirement that a claim be presented to the Secretary. *Id.* The requirement that the administrative remedies be completely exhausted may be waived by either the Secretary or by the court. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 72-73, 76-77 (1976).

Petitioner acknowledges that at least some of the named respondents have satisfied the non-waivable requirement by filing the required claim with the Secretary. Petition at 20. However, the Secretary argues that complete exhaustion cannot be waived because she "moved to dismiss the action under 42 U.S.C. § 405(g) on the ground that respondents had not exhausted their administrative remedies thereby refuting any suggestions that he [sic] had determined that the denial of coverage for BCBR prior to an ALJ hearing or Appeals Council review was a sufficiently 'final decision' for purposes of judicial review." Petition at 18.

Paradoxically, the Secretary contemporaneously argues that the BCBR Ruling is "binding upon ALJs and the Appeals Council" and henceforth will prohibit any Medicare payment for BCBR. Petition at 6. The Secretary's statement before this Court merely confirms identical assertions and stipulations made in the District Court and the Court of Appeals. *See* supra at 6-7. Further, as both petitioner and the Court of Appeals recognize, all BCBR claims for treatment rendered after issuance of the BCBR Ruling have been denied "on that basis alone." Petition at 20 n.15. *See also Ringer v. Schweiker*, 697 F.2d 1291, 1293 (9th Cir. 1982).

The Secretary's repeated assertions that the ALJs and the Appeals Council are bound by the BCBR Ruling and that BCBR claims cannot be allowed under any circumstances,

bring this case within the doctrine of *Mathews v. Diaz*, 426 U.S. 67 (1976) and obviate any need for further exhaustion of administrative remedies. In *Diaz* this Court noted that Section 405(g) jurisdiction was available to hear and decide the benefit claims of a plaintiff who had not exhausted the prescribed administrative process because "in colloquy with the [District] court [the Secretary] acknowledged that [plaintiff] had filed an application which could not be allowed under the statute." *Id.* at 73 (footnote omitted). This Court also held that jurisdiction also was available to decide the claim of second plaintiff because the Secretary had stipulated in the District Court—and reaffirmed in briefs before this Court—that the application would not be allowed. This Court ruled: "For jurisdictional purposes, we treat the stipulation in the District Court as tantamount to a decision denying the application and as a waiver of the exhaustion requirements." *Id.* at 76-77.

In this case there is much more than a concession in colloquy between counsel and the District Court. Here, the Secretary stipulated that all BCBR claims are "excluded from Medicare coverage." Supra at 6. Moreover, the Secretary formalized her position after the initiation of this litigation by publishing it in the *Federal Register* as a Health Care Financing Administration Ruling in order to insure that ALJs and the Appeals Council would deny benefits for BCBR. The Secretary even now insists in this Court, as she did before the District Court and the Court of Appeals, that the Ruling absolutely binds the Administrative Law Judges and the Appeals Council to uncritical acceptance of the absolute ban on BCBR coverage. Petition at 6. As in *Diaz*, the Secretary's repeated concessions that all BCBR claims will be denied is tantamount to a final decision and a waiver of further administrative exhaustion.

Petitioner's statement that the Court of Appeals "pointed to nothing to suggest that the Secretary, by issuing the ruling had waived the requirement of full exhaustion of administrative remedies," Petition at 19, ignores the factual basis of the Court of Appeals decision. The Secretary has admitted over and over again the accuracy of the Court of Appeals conclusion that "the Secretary's ruling makes the results of that [administrative hearing] process both pre-ordained and immutable," 697 F.2d

at 1295, and, therefore, both "futile" and "worthless to the Agency as well as the claimant." *Id.* The Secretary's own statements during the course of this litigation bring this case within the principles of *Salfi* and *Diaz*. In this case "further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Ringer v. Schweiker*, 697 F.2d 1291, 1295 (9th Cir. 1982), *quoting, Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975).

Petitioner also erroneously suggests that respondents have presented "no colorable claim that an erroneous denial of benefits for the BCBR procedure at an early stage in the administrative proceedings will injure them in a way that cannot adequately be remedied if they are subsequently awarded benefits." Petition at 23. Petitioner's argument ignores the nature of the injury which respondents allege and, therefore, the basis of the Court of Appeals ruling.

In *Mathews v. Eldridge*, 424 U.S. 319 (1975) this Court cautioned that "[t]he core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable." 424 U.S. at 331 n.11. The essence of respondents' principal claims is that the Secretary's insistence upon duplicative litigation violates 42 U.S.C. § 405(h) and denies due process of law. Thus, respondents' principal claims rest on the proposition that exhaustion of the administrative remedy causes the unlawful injury. *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976). If respondents are forced to litigate their claims before the Agency prior to seeking judicial determination that the relitigation policy is unlawful, the injury will be complete and irremediable.

The Court of Appeals ruling that further administrative exhaustion "would fail to vindicate all the interests pressed by claimants even if the claimants won the appeal," 684 F.2d at 647, is consistent not only with *Eldridge* but with numerous decisions of this Court and of the lower courts holding that exhaustion of administrative remedies is not required where

"the plaintiff contends that the administrative system is unlawful or unconstitutional in form or application." [7] *Patsy v. Florida International University,* 634 F.2d 900, 904 (5th Cir. 1981), *reversed on other grounds,* ____ U.S. ____, 102 S. Ct. 2,557 (1982). *See also Barry v. Barchi,* 443 U.S. 55, 63 n. 10 (1979), *quoting, Gibson v. Berryhill,* 411 U.S. 564 (1973); *Ostereich v. Selective Service System,* 393 U.S. 223, 241-42 (1968) (Harlan, J., concurring); *Leedom v. Kyne,* 358 U.S. 184, 188 (1958); *Himmler v. Califano,* 611 F.2d 137, 148 (6th Cir. 1979); *Continental Can Co. v. Marshall,* 603 F.2d 590, 597 (7th Cir. 1979); *Caswell v. Califano,* 583 F.2d 9, 13-15 (1st Cir. 1978); *Blankenship v. Secretary of HEW,* 587 F.2d 329, 332 (6th Cir. 1978); *Wright v. Califano,* 587 F.2d 345, 349 (7th Cir. 1978).[8]

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[7] Petitioner refers to some BCBR claimants' request that the Appeals Council stay administrative proceeding relating to BCBR pending the outcome of this case as an example of respondents' supposed efforts to avoid exhaustion of administrative remedies. Petitioner's argument is misleading. Respondents allege that having to submit to the unlawful review process causes their injury. Petitioner's argument, if successful, would foreclose any meaningful remedy from respondents and other similarly situated claimants even if their claim that the Secretary's review process is unlawful is correct. The request for stay of the administrative proceedings was predicated on respondents' belief that those proceedings are unlawful. The request merely was an effort to preserve the court's ability to award effective relief.

[8] This Court elsewhere has rejected the Secretary's suggestion that further proceedings should be required because they might lead to reconsideration of the Ruling:

> It is unrealistic to expect that the Secretary would consider substantial changes, in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context.

Mathews v. Eldridge, 424 U.S. 319, 330 (1976). Furthermore, the history of this case counsels against giving credence to the Secretary's claim. If adverse decisions from ten separate ALJs sitting in twenty five consolidated cases and the Appeals Council do not cause the Secretary to reconsider or revise her Ruling, the suggestion that an additional administrative appeal would prompt such action is incredible. In fact, the Ruling issued in response to this litigation absolutely denies BCBR coverage based upon the very same 1978 government report relied upon by the Appeals Council, among other things, to rule that the medicare program must pay the costs of BCBR. *In re*

(footnote continues)

Furthermore, respondents' interest in prompt resolution of the issues before the District Court often is founded upon life or death concerns and always is predicated upon a personal interest in restoring their ability to function as viable human beings. Petitioner wholly ignores the fact that the BCBR Ruling—and the necessity of litigating to obtain benefits —often precludes or delays beneficiaries, such as plaintiff Ringer, from obtaining treatment. In another case where it was claimed that such delay was of no consequence this Court has said:

> To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. Cancer, heart disease, or respiratory illnesses, if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment. [Footnote omitted].

Memorial Hospital v. Maricopa County, 415 U.S. 250, 261 (1974).

This case demonstrates the cold, hard human realities anticipated in *Memorial Hospital.* Two of the original, named plaintiffs in this case have died since the complaint was first filed. A third plaintiff's condition deteriorated to the point that BCBR was done on an emergency basis. The Secretary stipulated in the District Court that a fourth plaintiff would testify that BCBR has been prescribed to relieve "severe breathing difficulties" suffered as a symptom of "severe lung disease," but that he was unable to obtain BCBR because of

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(footnote continues)

Ferguson, No. 126-12-3830 at 18 (HHS Appeals Council, October 18, 1978). In addition, while the Secretary argues that exhaustion will permit development of an administrative record for judicial review, Petition at 24, the Court of Appeals pointed out that "an extensive record has been compiled in the administrative proceedings held thus far, to which the court could look to determine any facts that it might find useful." *Ringer v. Schweiker,* 697 F.2d 643, 646 n.1 (9th Cir. 1982).

inability to pay the cost of the treatment. Because of their physical condition and their dependency upon the health insurance coverage provided by medicare, respondents clearly have raised at least a colorable claim that erroneous denial (and delay) in the payment of benefits will damage them "in a way not recompensable through retroactive payments." *Mathews v. Eldridge,* 424 U.S. 319, 331 (1976). Petitioner has pointed to no interest in further exhaustion sufficiently compelling to overcome respondents' interest in their life and health.

The Court of Appeals conclusion that the BCBR Ruling "makes clear that the Secretary will treat as final any denial of benefits for the BCBR operation," 697 F.2d at 1295, also is consistent with the holdings of other Courts of Appeals. In circumstances similar to the present case, the Second Circuit has found that even informal republication of a similar policy statement during litigation challenging that policy was sufficient to confer subject matter jurisdiction:

> We note . . . that the Secretary has had ample opportunity since the decision below to modify his position to conform to the Appeals Council rulings. Instead, during the pendency of this appeal, he has distributed new forms [reaffirming the policy rejected by the Appeals Council]. We agree with the Third Circuit that a "final position" by the Secretary may, in some circumstances, amount to a "final decision". [Citations omitted]. We find that under the circumstances here there is subject-matter jurisdiction in the District Court.

Jones v. Califano, 576 F.2d 12, 19 (2nd Cir. 1978). *See also Liberty Alliance for the Blind v. Califano,* 568 F.2d 333, 346 (3rd Cir. 1977); *Ellison v. Califano,* 546 F.2d 1162, 1164 (5th Cir. 1977); *DeLao v. Califano,* 560 F.2d 1384, 1388 (9th Cir. 1977); *Wilson v. Edelman,* 542 F.2d 1260, 1271-74 (7th Cir. 1976).[9]

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[9] The cases cited by petitioner as standing for the proposition that exhaustion is still required even if the administrative process might not resolve the claims in the claimant's favor are inapposite. Petition at 23. The cases cited by petitioner noted that relief might still have been available through the administrative process. Here the Secretary insists that the payment ban is

(footnote continued)

Jurisdiction over this case is available under 42 U.S.C. § 405(g). The ruling of the Court of Appeals is not only consistent with *Weinberger v. Salfi*, 422 U.S. 749 (1975) and with *Mathews v. Eldridge*, 424 U.S. 319 (1976), but is dictated by this Court's holding in *Mathews v. Diaz*, 426 U.S. 67 (1976). Review should be denied.

III. The Court Of Appeals Properly Held That Respondents' Claims Fall Within The District Court's Mandamus Jurisdiction.

Petitioner dismisses in a footnote the Court of Appeals holding that jurisdiction under the mandamus statute, 42 U.S.C. § 1361, is available with respect to respondents' procedural claims. The Court of Appeals ruling with respect to the availability of mandamus jurisdiction is not only correct, it is also consistent with the holding of virtually every other court which has addressed the question squarely. Moreover, as in *Califano v. Yamasaki*, 442 U.S. 682, 698 (1978), it is unnecessary to determine the availability of mandamus jurisdiction because, as discussed previously, it is apparent that jurisdiction is available under 42 U.S.C. § 405(g).

The Courts of Appeals consistently have held that jurisdiction to review administrative action exists under Section 1361 where an administrative agency "owes the plaintiff a clear duty to act." *Ellis v. Blum*, 643 F.2d 68, 81 (2nd Cir. 1981) (Friendly, J.).[10] *See also American Assoc. of Councils of Medical Staffs v. Califano*, 575 F.2d 1367, 1373 (5th Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Barnett v. Califano*, 580 F.2d 28, 31 (2nd Cir. 1978); *Matos v. Secretary of H.E.W.*,

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(footnote continues)

absolute. Petition at 6. In addition, the cases involve claims for hospital reimbursement and do not involve claims by individual claimants that the benefit review procedures are illegal.

[10] Care should be taken to distinguish cases, including some arising in the social security context, where a *writ* of mandamus was denied because the party seeking the writ had failed to allege or to demonstrate the traditional prerequisite to mandamus jurisdiction, *i.e.*, the existence of a judicially enforceable duty. *Compare, e.g., Hadley Memorial Hospital, Inc. v. Schweiker*, 689 F.2d 905, 912 (10th Cir. 1982); *Americana Healthcare Corp. v. Schweiker*, 688 F.2d 1072, 1083-87 (7th Cir. 1982); *Cervoni v. Secretary of Health Education & Welfare*, 581 F.2d 1010, 1019-20 (1st Cir. 1978) *with Mattern v. Weinberger*, 519 F.2d 150, 155-57 (3rd Cir. 1975), *vacated on other grounds*, 425 U.S. 987 (1976) and *with* the other cases cited in the text.

581 F.2d 282, 286 n.6 (1st Cir. 1978); *Association of American Medical Colleges v. Califano,* 569 F.2d 101, 113 (D.C. Cir. 1977); *Elliott v. Weinberger,* 564 F.2d. 1219, 1226-27 (9th Cir. 1977); *Ryan v. Shea,* 525 F.2d 268, 271-72 (10th Cir. 1975); *Mattern v. Weinberger,* 519 F.2d 150, 155-57 (3rd Cir. 1975), *vacated on other grounds,* 425 U.S. 987 (1976); *Frost v. Weinberger,* 515 F.2d 57, 62 (2nd Cir. 1975), *cert. denied,* 424 U.S. 958 (1976); *Martinez v. Richardson,* 472 F.2d 1121, 1125-26 (10th Cir. 1973).

In contrast to petitioner's argument, the Courts of Appeals which have addressed the question directly have held that the authors of Section 405(h) could not have intended to preclude Section 1361 mandamus jurisdiction because, as petitioner admits, the statutory grant of mandamus jurisdiction did not exist at the time the Social Security Act's jurisdictional limitations were enacted. Moreover, as one court has held:

> when Congress enacted § 405(h) in 1939, it did not bar the District of Columbia courts from issuing writs of mandamus against the Secretary's predecessor, and that when the power to issue such writs was decentralized in 1962, it did not then suddenly become subject to § 405(h)'s stricture.

Ellis v. Blum, 643 F.2d 68, 81 (2nd Cir. 1981). *See also Elliott v. Weinberger,* 564 F.2d 1219, 1227 n.12 (9th Cir. 1977). *Cf. West Coast Exploration Co. v. McKay,* 213 F.2d 582, 592 (D.C. Cir.) (*en banc*), *cert. denied,* 347 U.S. 989 (1954). ("[T]he United States District Court for the District of Columbia has long exercised jurisdiction in cases in which mandatory relief compelling the performance by a federal officer of a clear legal duty is sought.") Furthermore, "[t]his conclusion is fortified by the knowledge that when Congress desired to prohibit actions in the nature of mandamus to review decisions involving the dispensation of another type of federal disability benefit, it did so expressly." *Ellis v. Blum,* 643 F.2d 68, 81 n.14 (2nd Cir. 1981). Despite regular rulings by the Courts of Appeals holding that mandamus jurisdiction is available in the present circumstances, the statutory bar is, and always has been, limited

to preclusion of jurisdiction under specified jurisdictional provisions. The choice to bar jurisdiction only under specified statutes must be viewed as deliberate and should be respected.[11]

Notwithstanding petitioner's argument to the contrary, this case plainly is appropriate for the exercise of mandamus jurisdiction. Respondents have alleged that the Secretary violated specific statutory and constitutional duties.

For example, respondents have alleged that the Secretary has an obligation under Section 405(h)—the very same section petitioner asserts precludes jurisdiction here—to conform his benefit review procedures to the decisions of the Administrative Law Judges and the Appeals Council. The first sentence of that provision states:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing.

42 U.S.C. § 405(h). It has been held that "the obvious purpose of [Section 405(h)] is to declare that res judicata principles are applicable to the findings and decisions of the SSA made in certain procedural contexts." *Stuckey v. Weinberger,* 488 F.2d 904, 909-910 (9th Cir. 1973). *Cf. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, Inc.,* 402 U.S. 313, 339-342 (1971). The Secretary plainly has no discretion to ignore the statutory mandate.[12]

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[11] Petitioner's alternative argument—that the second sentence of Section 405(h) bars mandamus jurisdiction even if the third does not—is wholly without merit. Insofar as this case is concerned the sentence states that no findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or government agency except as herein provided. The Court of Appeals decision plainly does not authorize mandamus to review findings of fact or a decision by the Secretary denying benefits. Instead, the ruling expressly limits the availability of mandamus to procedural questions. *Ringer v. Schweiker,* 697 F.2d 1291, 1294, 1296 (9th Cir. 1982).

[12] Petitioner's argument that mandamus is inappropriate because of the "discretionary and judgmental nature of the Secretary's decision," Petition at 16 n.12, ignores wholly the duties alleged by respondents. It is ludicrous to suggest, as petitioner appears to do, that the jurisdictional preclusion contained in the second and third sentences of Section 405(h) is mandatory and judicially enforceable, but the res judicata principles contained in the first sentence of the same section are merely advisory and not subject to judicial enforcement.

In addition, the complaint alleges that the Secretary has a constitutional duty under the due process clause to conform her claims review process to the decisions of the Administrative Law Judges and the Appeals Council. While the Secretary ignores such allegations, the Courts of Appeals have found federal agencies bound by precisely the constitutional duty alleged by respondents. *See, e.g., Jones v. Califano,* 576 F.2d 12, 18 (2nd Cir. 1978) ("[T]he Secretary's refusal to follow the rulings of his own Appeals Council raises colorable questions of equal protection and due process."); *Continental Can Co. v. Marshall,* 603 F.2d 590 (7th Cir. 1979). *Cf. Montana v. United States,* 440 U.S. 147 (1979); *Parklane Hosiery Co v. Shore,* 439 U.S. 322 (1979); *Starker v. United States,* 602 F.2d 1341 (9th Cir. 1979).

The duty alleged by respondents has been recognized and enforced by the courts in virtually identical circumstances and plainly is sufficient to bring this action within the District Court's mandamus jurisdiction. Review is unwarranted.

IV. The Court Of Appeals Ruling That Respondents' Claims May Be Heard Under 28 U.S.C. § 1331 Is Not Inconsistent With Prior Decisions Of This Court.

Because 42 U.S.C. § 405 establishes a jurisdictional base for this case irrespective of whether respondents' claims are characterized as claims for benefits or as procedural claims, it is unnecessary to consider petitioner's argument that the Court of Appeals mischaracterized such claims as procedural and erroneously asserted federal question jurisdiction, 28 U.S.C. § 1331. *See, e.g., Califano v. Yamasaki,* 442 U.S. 682, 698 (1978). However, petitioner's claim that *Salfi* and *Eldridge* preclude federal question jurisdiction here is plainly wrong. In fact, the differences between the present case and *Salfi* and *Eldridge* demonstrate that the Court of Appeals characterization of respondent's principal claims was correct and that federal question jurisdiction was properly asserted.

The significance of characterizing respondents' lawsuit as an action to recover medicare "benefits" derives solely from 42 U.S.C. § 405. As the Court of Appeals noted, Section 405, "the statute limiting the jurisdictional basis of claims arising under

the Medicare Act has a relatively narrow scope". *Ringer v. Schweiker,* 697 F.2d 1291, 1293 (9th Cir. 1982). Thus, it has been held that "§ 405(h) addresses only those actions brought 'to recover on any claim' it does not preclude the instant suits, which are not for the recovery of benefits." *Elliott v. Weinberger,* 564 F.2d 1219, 1227 n.11 (9th Cir. 1977). If the action is not one "to obtain payments pursuant to the Medicare Act," *St. Louis University v. Blue Cross Hospital Service,* 537 F.2d 283, 289, 291-92 (8th Cir.), *cert. denied,* 429 U.S. 977 (1976), and "granting the relief requested [will not] result in an entitlement to benefits," *Elliott v. Weinberger,* 564 F.2d 1219, 1226 (9th Cir. 1977), the action is not one brought to recover on a claim subject to Section 405(h). *See also Humana of South Carolina, Inc. v. Schweiker,* 590 F.2d 1070, 1080 (D.C. Cir. 1978). *Cf. Wright v. Califano,* 587 F.2d 345, 349-50 (7th Cir. 1978).

Tested against such a standard, it is clear that respondents do not seek to "recover on a claim" and, accordingly, jurisdiction is not restricted by Section 405. Respondents do not seek any monetary payment under the medicare act, nor do they seek a declaration of entitlement to benefits which will automatically result in the payment of medicare funds. In the Court of Appeals the Secretary expressly acknowledged that respondents "do not pray for the payment of money." (Appellee's Brief at 14).

Respondents repeatedly have stated that the District Court should not redetermine the substantive validity of the Secretary's Ruling. In fact, a cornerstone of respondents' principal claim is that the substantive determination of BCBR's safety and efficacy already has been made on behalf of the Secretary by the ALJs and by the Appeals Council and that, under 42 U.S.C. § 405(h) and the due process clause, such determination is binding upon the District Court as well as the Secretary. The injury which respondents allege is that the Secretary forces them to relitigate repeatedly issues which the Secretary has no right to litigate. Thus, even if respondents are successful in this litigation, and the Secretary is precluded from requiring repeated relitigation, BCBR claimants for medicare benefits will

still be required to pursue their claims for payment through the administrative process, as have respondents here. The Secretary would still be free to deny claims for BCBR if the treatment was not reasonable and necessary for any reason other than those previously resolved in the administrative process. On the other hand, if respondents are forced to submit to the illegal review process before judicial determination of their principal claims that the process is unlawfully constituted, the claims very well may become moot.

Comparison of the nature of the relief sought by respondents here with the relief sought in *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976) demonstrates the fallacy of petitioner's contention that the Court of Appeals ruling is inconsistent with the rulings of this Court. Plaintiffs in *Salfi* and *Eldrige* brought suit "seeking increased reimbursement under the Social Security Act." Petition at 13. Thus, unlike respondents here, plaintiffs in both *Salfi* and *Eldridge* sought and received relief from the lower courts which included payment of benefits under the Social Security Act—benefits which they otherwise never would have received.

This Court's decision in *Salfi* repeatedly emphasizes that the jurisdictional restrictions of 42 U.S.C. § 405(h) applied because it is "Social Security benefits which appellees seek to recover." 422 U.S. at 760. *See also id.* at 755, 761. Similarly, in *Eldridge* while plaintiff challenged the Secretary's procedures, he also claimed an immediate right to payment of benefits under the Social Security Act. 424 U.S. at 319. In contrast, respondents here have not requested payment of benefits, but as the Court of Appeals held, have "sought, first and foremost, to invalidate the Secretary's procedure." 684 F.2d at 646. *See also St. Louis University v. Blue Cross Hospital Service*, 537 F.2d 283, 292 (8th Cir. 1976) (Jurisdiction not barred where relief "will not necessarily affect the University's entitlement to reimbursement or the amount allowed.").[13]

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[13] Petitioner's claim that Section 405(h) limits jurisdiction even if the claims are in fact procedural rather than claims for benefits is supported by neither the statute nor the cases cited. Section 405(h) by its terms applies only to actions seeking to recover on a claim araising under the Medicare Act. Further, contrary to petitioner's argument, neither *Mathews v. Eldridge*, 424

(footnote continued)

Granting the relief sought by respondents will not result in the payment of benefits and, consequently, this action is not one to recover medicare benefits subject to the restrictions of 42 U.S.C. § 405(h).[14]

(footnote continues)

U.S. 319 (1976) nor *Califano v. Yamasaki*, 442 U.S. 682 (1979) holds that procedural claims *must* be brought under Section 405. Instead, even at their broadest reading, those cases merely stand for the proposition that a collateral procedural claim *may* be brought under Section 405 when coupled with a claim of entitlement to benefits.

[14] Petitioner also argues that review is warranted to resolve a conflict between the Circuits over the question whether 42 U.S.C. § 405(h) precludes federal question jurisdiction over claims that are procedural in nature. This case is not the case in which any such conflict should be resolved. First, the conflict alleged by petitioner exists, if at all, only with respect to whether 42 U.S.C. § 405(h) "bars federal question jurisdiction over Administrative Procedure Act ("APA") and related procedural challenges". Petition at 15. In this case the Court of Appeals did not address respondents' APA claims separately, but subsumed such claims in its general ruling. If this Court is to address the alleged conflict it would be more appropriate to do so in the context of a case in which the issue is raised directly and addressed expressly. Further, most, if not all, of the cases which petitioner claims hold that federal question jurisdiction is barred over purely procedural claims involved challenges which, if successful, would have resulted directly and automatically in increased reimbursement under the Social Security Act. *Compare Hadley Memorial Hospital, Inc. v. Schweiker*, 689 F.2d. 905 (10th Cir. 1982) (Challenge to rule limiting reimbursement of hospital costs for malpractice coverage) and *Trinity Memorial Hospital of Cudahy, Inc. v. Associated Hospital Service, Inc.*, 570 F.2d. 660, 663 (7th Cir. 1977) ("Trinity sought as relief a judgment that the . . . Secretary be ordered to refund the reimbursable costs in the sum of $61,567 or $42,536 . . . .") *with National Assoc. of Home Health Agencies v. Schweiker*, 690 F.2d 932, 937-38 (D.C. Cir. 1982), *cert. denied*, ____U.S.____, 103 S. Ct. 1193 (1983) (Jurisdiction over action is not precluded where "reimbursement is not its ultimate goal."). Consequently, insofar as the issues here are concerned, the conflict perceived by petitioner is more perceived than real. *Compare Daniel Freeman Memorial Hospital v. Schweiker*, 656 F.2d 473 (9th Cir. 1981) *with Ringer v. Schweiker*, 697 F.2d 1291, 1294 (9th Cir. 1982). Moreover, petitioner ignores the fact that in all of the decisions allegedly holding that review of procedural claims must be channeled through 42 U.S.C. § 405, the claims could have been raised in the administrative process and effective relief awarded, either by the agency or on judicial review if deserved. Here, of course, respondents contend that the benefit determination procedures are unlawful. Thus, if they are forced to submit to such procedures their principal claims may be moot and the injury will be complete and irremediable.

V. Petitioner's Claim That The Court Of Appeals Decision Will Disrupt The Administration Of The Medicare Program Is Erroneous.

Petitioner's final appeal for review by this Court rests on the claim that, unless overturned, the decision of the Court of Appeals will open the floodgates of litigation and "substantially" disrupt "the orderly and efficient administrative determination of claims for benefits under the Medicare Program and the Social Security Act generally." Petition at 24. Petitioner wholly ignores the unique factual circumstances in which the present case arose. Further, the objective evidence flatly refutes the Secretary's exaggerated 'floodgates of litigation' argument.

This case arose in a factual setting which the Second Circuit has characterized accurately as "unusual" and raises jurisdictional issues which that court properly labeled "novel". *Jones v. Califano,* 576 F.2d 12, 17, 22 (2nd Cir. 1978). Specifically, this case was filed because the Secretary persists in ignoring and, indeed, in flaunting the decisions of ten different ALJs (rendered in twenty-six consolidated cases) and of her own Appeals Council which, prior to the BCBR Ruling, consistently rejected the Secretary's absolute prohibition on payment for BCBR. Respondents' essential grievance is that the Secretary unlawfully forces them to relitigate repeatedly a single issue which, prior to issuance of the BCBR Ruling, the Agency always lost.

The reason petitioner ignores the factual circumstances of the present case is obvious. In over forty years since the Social Security Act has been law there is *one* other reported decision in which a plaintiff challenged the Secretary's failure to adhere to the decisions of her ALJs and the Appeals Council. *See Jones v. Califano,* 576 F.2d 12 (2nd Cir. 1978).[15] Moreover, although the *Jones* court held, like the Court of Appeals here, that it had jurisdiction, in more than four years since the Second Circuit

[15] The *Jones* case involved a mere four administrative decisions rejecting the Secretary's policy. The Second Circuit found jurisdiction under 42 U.S.C. § 405(g).

decision, there had not been another factually similar reported case until this action. In fact, aside from *Jones,* there is only one other reported decision involving *any* other federal agency which addresses the specific factual and jurisdictional issues raised by respondents here. *See Continental Can Co. v. Marshall,* 603 F.2d 590 (7th Cir. 1979). The objective evidence—the absence of factually similar cases despite a Second Circuit ruling virtually identical to that issued by the Court of Appeals here—simply does not support petitioner's claim that the Court of Appeals decision threatens substantial disruption in the administration of the medicare program.

Finally, the practical implications of the Secretary's arguments against jurisdiction should not be ignored. As the Second Circuit has pointed out, claimants who receive favorable ALJ decisions have neither the desire nor the right to appeal such decisions to federal district court. *Jones v. Califano,* 576 F.2d 12, 18 (2nd Cir. 1978). The Secretary, of course, has no right to appeal her own decisions. The lack of appeal in such circumstances is to be expected but it does not take into account the unusual situation where, as was the case here prior to the Ruling, the ALJs and Appeals Council consistently rule "in favor of claimants and the Secretary refuses to implement the method of benefit calculation adopted by his Appeals Council." *Id.* at 18.

Congress decreed that the findings and decisions of the Secretary after a hearing were binding upon all parties to the hearing, the Secretary as well as the claimant. 42 U.S.C. § 405(h). The same Congress could not have intended to permit the absurd result for which the Secretary argues here. Unless jurisdiction is available to compel the Secretary to modify positions consistently rejected by his own ALJs, the Agency will be able to flaunt the ALJ decisions, to force claimants to relitigate repeatedly the same legal issues and to operate indefinitely pursuant to illegal policies.

CONCLUSION.

The Secretary's insistence that elderly and disabled medicare beneficaries must relitigate repeatedly issues which she has repeatedly lost is both unlawful and fundamentally unjust. The Court of Appeals holding will permit the District Court to correct the injustice. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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